United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

76-4049,4061,4074

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

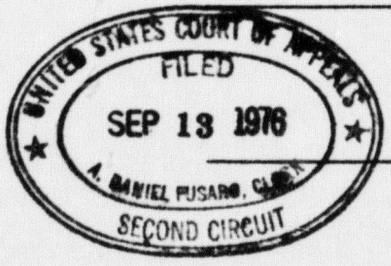
-and-

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY
AMERICAN PETROLEUM INSTITUTE,

Intervenors.

B
P/S

Petition For Review Of A Report and Order
Of The Federal Communications Commission



BRIEF OF INTERVENOR
HAWAIIAN TELEPHONE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF INTERVENOR HAWAIIAN TELEPHONE COMPANY

INTRODUCTION

Hawaiian Telephone Company (Hawaiian Telephone) an intervenor in this case, fully supports the Federal Communications Commission's (FCC) January 19, 1976 Report and Order (FCC 76-10;

A-1-A-9) which is the subject of this review proceeding and respectfully urges its affirmance by the Court.

To avoid burdening the Court with unnecessary duplication and needless repetition, Hawaiian adopts the "Counterstatement of the Case" in Respondents Brief, with the following short statement of Hawaiian's particular interest in this proceeding.

THE INTEREST OF HAWAIIAN TELEPHONE

Hawaiian Telephone, a company organized under the laws of the Kingdom of Hawaii and now existing and operating under the laws of the 50th State, provides local exchange, intrastate, and interstate and foreign telecommunications services to the citizens of Hawaii.

In the provision of message toll telephone service, one of the telecommunications services offered by Hawaiian Telephone, Hawaiian's facilities are interconnected by satellite and underseas cable circuits with the facilities of American Telephone & Telegraph Company (AT&T) on the United States Mainland. For service to points west of Hawaii, similar interconnection arrangements exist between Hawaiian Telephone and its foreign correspondents, the telecommunications administrations in Japan, China, Hong Kong, Korea, the Philippines, Thailand, and Australia.

With regard to Hawaii-U.S. Mainland message toll telephone service, Hawaiian and its mainland correspondent,

AT&T were authorized by FCC to provide "Dataphone"[1/] service in 1965 (Dataphone Service, 38 FCC 1222; 1 FCC 2d 374 (1965)), have been providing it since that date, are currently providing it, and plan to continue to offer Dataphone service to their customers.

With regard to Hawaii-foreign points west service, however, Hawaiian has been precluded from allowing its customers to use its facilities for Dataphone service by essentially the same absence of authorization[2/] as is the situation with AT&T.

Hawaiian Telephone is thus placed in the anomalous position of advising its customers having interests both east and west of Hawaii, e.g., Dillingham, Amfac, that the same telephone that the customer is using and has been using for some ten years for the transmission of facsimile material to his office on the U.S. Mainland cannot be used to transmit facsimile material to his office in Japan. This advice becomes even more imcomprehensible when his office in Japan is using the message telephone network to send facsimile material to him in Hawaii.

1/ The word "Dataphone" is a registered service mark of AT&T. Dataphone service, however, is simply the use by a customer of his telephone and the existing telephone network to send facsimile or other non-voice material to another telephone customer (FCC Report and Order, n. 1; A-1).

2/ The FCC Report and Order here on review refers to AT&T's authorizations as "limited to existing specified services" (Report and Order, p. 9; A-9). The "limitation", however, is an absence of specification rather than an express restriction.

This is the nub of Hawaiian Telephone's concern with the status quo ante, and the central practical reason for its support of the January 19, 1976 FCC Report and Order.

SUMMARY OF ARGUMENT

The FCC Report and Order here on review is but a simple reaffirmation, wholly valid and correct in this instance,[3/] of long-standing and judicially mandated policy that telephone company customers should be allowed to use their telephones in ways that are privately beneficial without being publicly detrimental.

There is no way, in fact, that telephone companies such as Hawaiian can in the real world prevent or foreclose use by its customers of say, acoustically coupled facsimile equipment,[4/] for within its capability the telephone network responds identically and equally well to, and without knowledge of or the ability to discriminate among, impulses generated by a customer speaking Hawaiian, Japanese or English, or a customer playing a record, beating a drum or using an acoustic coupler.

[3/] This qualification is inserted here because unlike erroneous "reaffirmations" by FCC in other cases involving substitution and replacement of telephone company equipment, neither substitution nor replacement of equipment nor even modification of any part of the telephone network is involved in this case. Here the customer merely uses the already existing capability of his telephone and the telephone network.

[4/] This coupling is accomplished by simply placing the telephone handset in a box-like cradle and closing the top of the box.

The so-called "international record carriers" (IRCs), Petitioners here, would have the court deny to telephone company customers -- and presumably require Hawaiian, AT&T, and all other telephone companies in these United States[5/] to in some unknown way enforce that denial -- the ability and the right to make privately beneficial use of their telephones. For what reason?

Petitioners' briefs make the reason shockingly clear. They contain, in essence, plaintive pleas for protection of the IRCs' selfish interests and demands for competitive equality as a pre-condition to the telephone company customers use of their telephones for Dataphone service. In short, say the IRCs, until they look precisely like overseas telephone companies, there must be no overseas Dataphone service to customers.

Petitioners' plea for telephone company status misses the simple, single point of the January 16, 1976 FCC Report and Order -- that restricting the use of overseas message telephone service to voice-only is not in the public interest. Petitioners do not address this point, but rather argue extensively and intensively a new and different case of their own making, not the case before the Commission on January 16, 1976.

[5/] In addition to the 24 Bell System operating companies and Hawaiian Telephone, there are approximately 1600 other "Independent" (non-Bell) telephone companies in this country.

Moreover, Petitioners' desire for a protective umbrella is no reason for denying to customers use of a communications service that is readily available over existing facilities; and the equalization of competition among would-be competitors, the gist of the IRCs new case arguments, is not the role assigned to FCC by the Congress.

ARGUMENT

I. SERVICE TO CUSTOMERS IS THE BASIC PUBLIC INTEREST CONCEPT.

The first section of the Communications Act of 1934 calls for FCC regulation of interstate and foreign commerce in communication

> ". . . so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . ." (47 U.S.C. 151) (emphasis supplied).

Nothing is said in this section, or in any other part of the FCC charter, that would suggest a Congressional mandate to FCC that it must regulate so as to make available four nation-wide and world-wide communication services (Hawaiian Telephone and other telephone companies, plus the three IRCs); nor is it suggested that FCC regulation should deny to the people of the United States use of a communication service readily available over existing facilities until such time as FCC has regulated so as to create and foster four equalized competitors. This, however, is precisely the position urged on this Court by Petitioners.

The facts here, as found by FCC in its Report and Order (pp. 5-6; A-5-6) are

1) That there now exists a rapid, efficient, nationwide and world-wide communication service with adequate facilities at reasonable charges;

2) that this service (message toll telephone service) and these existing facilities can be used by customers for Dataphone service without addition or modification;[6] and

3) that there is an existing and growing customer demand for overseas dataphone-type service.

Having found these undisputed and indisputable facts, no other conclusion could be rationally reached by any regulatory agency but that use of the message toll telephone network for overseas Dataphone service should not be denied to customers. And this is what FCC decided in the Report and Order -- this and no more. In FCC's own words:

> "11. Upon reviewing the record of this inquiry, we conclude that it is no longer appropriate to restrict the use of overseas message telephone service to voice-only. Customers with terminal equipment that is being used in conjunction with the domestic MTS network are prohibited from using that same equipment when making overseas calls, despite a need for such service. We find this restriction not in the public interest. Accordingly, we are directing the Chief, Common Carrier Bureau, to accept applications from AT&T pursuant to Section 214 of the Act, 47 U.S.C. 214, to add dataphone-type services to the categories of service for which it may use its overseas facilities, as described herein." (A-6-7).

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[6] Use of the existing message toll telephone service and facilities would also involve no additional cost other than the cost of handling the additional calls (FCC Report and Order, p. 5; A-5).

For this policy determination, necessarily reached on the facts as outlined above, FCC found additional convincing support in the venerable Hush-A-Phone[7/] policy. As there enunciated by the court (238 F.2d, at 269),

> "The question, in the final analysis, is whether the Commission possesses enough control over the subscriber's use of his telephone to authorize the telephone company to prevent him from conversing in comparatively low and distorted tones."
>
> * * *
>
> "To say that a telephone subscriber may produce the result in question by cupping his hand and speaking into it, but may not do so by using a device which leaves his hand free to write or do whatever else he wishes, is neither just nor reasonable. The intervenors' tariffs, under the Commission's decision, are in unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."

Both the questions of Commission control and telephone company prevention, as well as "the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental" are present in the case now before the court.

First, the Commission cannot effectively control nor can the telephone companies as a practical matter prevent the acquisition and use by customers of, for example, facsimile equipment with an acoustic coupler, now widely available in the market place.

[7/] Hush-A-Phone v. U.S., 238 F.2d 266 (D.C. Cir. 1956). The Hush-A-Phone is a cup-like device that snaps on the mouthpiece of the telephone, intended to provide privacy of conversation and office quiet.

Second, it is an indisputable fact that that use of such equipment and his existing telephone is great private benefit to the customer, without a semblance of public detriment.[8/]

Indeed, Petitioners here do not contest the validity of these points, nor on close analysis do they even contest the soundness of the FCC conclusion that service demanded by customers should not be denied them. Thus the FCC decision on the basic public interest question before it, the removal of artificial regulatory or tariff restraints on customer use of an available service, clearly correct and more than adequately supported, should be summarily affirmed.

II. SERVICE TO CUSTOMERS DOES NOT DEPEND ON EQUALIZED COMPETITION.

Petitioners' briefs, as noted above, do not now question customer need for overseas d-taphone-type service, nor did the IRCs representations to the FCC in the proceeding below. There was, in fact, almost unanimous agreement[9/] among the parties to the FCC inquiry that customer demand was, as stated by FCC, "significant" (Report and Order, p. 2; A-2).

[8/] FCC might also have pointed to its Carterfone decisions (13 FCC 2d 420 (1968)); recon. den., 14 FCC 2d 571 (1968), where use of an acoustic coupler to link a mobile radio facility with the telephone network was found to be in the public interest.

[9/] The sole exception was Western Union Telegraph Company, a domestic carrier barred from overseas service by Section 222 of the Communications Act (47 U.S.C. 222).

Given these circumstances, it is perhaps not surprising that Petitioners now argue to the court not an absence of customer need for service, but rather seek a denial of the needed service until such time as FCC may have acted to establish and assure competitive equality among the three IRCs and between the IRCs and the telephone companies, particularly AT&T.

There are three things wrong with the IRCs argument:

1. A carrier's demand for competitive equality is no reason for further delay in meeting a significant demand by customers for service;

2. the competitive equality issue is currently being argued before the FCC, has not been decided below, and therefore is not now properly before the court;

3. The statutory standard for FCC action is public convenience and necessity, not competitive equality among carriers.

1. Service To Customers Should Not Be Further Delayed.

Hawaiian Telephone and AT&T have been providing Dataphone service between Hawaii and the U.S. mainland since 1965. The FCC overseas dataphone inquiry in its Docket No. 19558 was initiated on July 31, 1972. It is now more than four years since the beginning of the FCC inquiry, and almost eleven years since the inauguration of Hawaii-Mainland Dataphone service. The parochial self-interest of the IRC's simply cannot be permitted to further delay the availability of overseas dataphone service to customers, a service which requires no additional investment by Hawaiian or other telephone companies, a service which requires no modification of the existing message toll

telephone network, and a service for which a significant customer demand is universally recognized to exist.

Further delay is wholly unwarranted; and sad to relate, the interest of the customer public is the loser.

2. "Competitive Equality" Is Prematurely Before the Court.

Petitioner's "Addendum" conveniently and clearly shows that the competitive equality issue is not ripe for judicial review. To so conclude, the Court need look only at the first item listed in the table of contents -- "Petition for Interconnection of ITT World Communications, Inc. dated April 8, 1976," a pleading filed almost three months after release of the FCC Report and Order now before the court. As its caption suggests and as the pleading shows, ITT seeks an order from FCC requiring AT&T to provide it with "equal access interconnection," a term further described as "ITT Worldcom access to the domestic network of the Bell System on the same basis as AT&T Longlines"[10/] (Addendum, p. 2). Under "equal access interconnection," then, ITT would look to the domestic telephone network and would operate as simply another overseas telephone company.

In short, it appears to be the desire and the request of ITT (and the similar requests of other two IRC's) that the

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10/ "AT&T Longlines" is the department of the Bell System that owns and operates overseas circuits, as well as most of the interstate circuits on the U.S. Mainland.

FCC find that the public interest now requires there to be three additional overseas telephone companies. Should the FCC be inclined to give serious consideration to this IRC proposition, it is obvious that such a drastic and dramatic restructuring of the overseas telephone industry and of overseas telephone service would require painstaking and in-depth analysis by FCC. At the very least, the necessary proceeding below would be somewhat controversial and lengthy and might well be a subject for judicial review after the FCC has reached a decision.

It is totally clear at this time, however, that FCC has not decided that the public interest either requires or does not require three additional overseas telephone companies. Until that decision is reached, however, petitioners' arguments for equalizing competition are not properly before the Court.

3. The Public Interest Standard Is Not Met By Equalization Of Competition.

Under the Communications Act of 1934, "no carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity requires or will require the construction, or operation, or construction and operation, of such additional or extended line." (47 U.S.C. 214).

Two cases are peculiarly pertinent, in the context of this public interest statute, to Petitioners' competitive equality contentions.

The basic principle, first set forth by Mr. Justice Frankfurther in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) is:

> "Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." (346 U.S. at 97).

Elaborating on this basic principle are the words of Circuit Judge Wilkey in Hawaiian Telephone Company v. FCC, 498 F.2d 771 (1974). In remanding a grant of a Section 214 certificate to RCA Globcom (a Petitioner here), Judge Wilkey, speaking for the court, observed:

> "Looming large in the Commission's rationale, indeed, undeniably the key factor in its decision, is competition. Competition as a factor might have some relevance to the FCC decision, if competition had been shown to be of benefit to the public on the communications routes in question. Yet it is all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors.
>
> This is not the objective or role assigned by law to the Federal Communications Commission. As a result of focusing first on competitors, next on competition, and then on the public interest, the FCC has given scant attention to the question of public convenience and necessity, and therefore has not met its statutorily imposed duty" (498 F.2d at 775-776).

The distinction between "equalizing competition among competitors" and the FCC public interest standard could not have been and cannot be more clearly expressed. The "equal access interconnection" currently sought by Petitioners in the new and ongoing proceeding below must be justified, if at all, on the requirement of public convenience and necessity, not on the equality of competition arguments offered to the Court here.

CONCLUSION

It is the interest of customers -- the public convenience and necessity -- that is to be served and is served by the FCC Report and Order in this case. For the reasons stated, the January 16, 1976, FCC Report and Order now before the Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas J. O'Reilly, hereby certify that a copy of the foregoing "Brief Of Intervenor Hawaiian Telephone Company" has been served this day, by United States mail, postage prepaid, on the following persons:

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